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records a part of the will as admitted to probate does not affect the rights of the parties.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 809; Dec. Dig. § 353.* 13 Va.-W. Va. Enc. Dig. 766.]

Appeal from Circuit Court, Loudoun County.

Action for the construction of the will of Charles Harris, deceased, and the administration of his estate. From degrees granting the relief asked for, Newton Harris and others appeal. Affirmed.

J. W. Foster and *Cecil Conner,* for appellants.

Chas. P. Janney and *Moore, Barbour & Keith,* for appellees.

MILLER & CO. *v.* LYONS.

March 14, 1912.

[74 S. E. 194.]

1. Brokers (§ 38*)—Stock Transactions—Conversion—Inconsistent Defenses.—In an action by plaintiff against his stockbrokers for alleged conversion of certain stocks by selling the same for alleged want of sufficient margins, propositions that the brokers had no right to sell the stocks without notice to plaintiff as they did, because of a prior course of dealing, and also because of an express contract to wait for called margins until the succeeding day, were not inconsistent.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 31-36; Dec. Dig. § 38.* 1 Va.-W. Va. Enc. Dig. 136.]

2. Brokers (§ 24*)—Margin Transactions—Broker's Right to Close Account—Waiver.—A provision in a broker's contract with its customers, reserving the right to close transactions without further notice whenever margins were running out, could be waived by the broker, either in express terms or by a course of dealing giving the customer the right to believe that his transactions would not be closed under such authority without notice.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 19; Dec. Dig. § 24.* 5 Va.-W. Va. Enc. Dig. 231, 238.]

3. Brokers (§ 24*)—Margin Transactions—Right to Close—Estoppel—Course of Dealing.—Where, by a course of dealing between a broker and customer for more than four years, the broker had not exercised or claimed an alleged right to close transactions without notice to the customer and an opportunity to deposit further margins, the broker might be estopped thereby from closing the customer's transactions contrary to such customary course of dealing.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 19; Dec. Dig. § 24.* 5 Va.-W. Va. Enc. Dig. 231, 238.]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

4. Brokers (§ 38*)—Margin Transactions—Right to Close—Course of Dealing—Evidence.—Evidence held to warrant a finding that by a course of dealing between broker and customer the broker had no right to close the customer's margin account without notice because the margins were running out.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 31-36; Dec. Dig. § 38.*]

5. Brokers (§ 38*)—Stocks—Wrongful Sale—Conversion—Instructions.—In an action against brokers for conversion of plaintiff's stocks, held on margin, by sale thereof without notice, an instruction that if, by a course of dealing, defendants had waived their right to strict performance of the contract and gave plaintiff time to maintain his margin, then defendants could not recall such waiver at their option without reasonable notice to plaintiff, so that he might have an opportunity to protect his stock, nor could defendants, if they made such waiver, sell the stock without notice to plaintiff, etc., was not inconsistent with another instruction that if plaintiff and defendants' agent, on the day of the sale, agreed that it would be satisfactory if he deposited additional margin on the next day, and plaintiff deposited the amount demanded on the next day, then defendants' prior sale of his stock was wrongful.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 31-36; Dec. Dig. § 38.*]

6. Trial (§ 252*)—Theories of Cause.—Plaintiff may properly advance more than one theory under which he may be entitled to recover, and introduce evidence in support of each, and ask the court to instruct with respect to both.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.* 1 Va.-W. Va. Enc. Dig. 136.]

7. Brokers (§ 38*)—Sale of Stock—Duty to Minimize Damages.—Where stockbrokers sold a part of plaintiff's securities held by them on margins, without authority, plaintiff was not bound, on discovering the fact, to immediately repurchase the stock so as to minimize the damages and diminish his loss, and was therefore not limited to a recovery of the difference between the price for which his stock was sold by the brokers and what it would have cost him to recover his position by a repurchase on a subsequent day.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 31-36; Dec. Dig. § 38.*]

8. Brokers (§ 38*)—Wrongful Sale of Stock—Damages.—Where stockbrokers wrongfully converted certain of plaintiff's stock held by them on margins by a sale without authority on a declining market on July 26, 1910, plaintiff was not bound to repurchase the stock at once, but was entitled to a reasonable opportunity to consult

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

counsel, to employ other brokers, to watch the market to determine whether it was advisable to purchase on a particular day or when the stock reached a particular quotation, and to raise funds if he decided to repurchase; and hence the court properly held that plaintiff was entitled to the time intervening between the time of the sale and August 16th following for that purpose, and was entitled to recover the difference between the price for which the stock sold and the highest price of the stock in the market between the date of the sale and the date fixed.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 31-36; Dec. Dig. § 38.*]

Error to Circuit Court of City of Richmond.

Action by John H. Lyons against Miller & Co. Judgment for plaintiff, and defendant brings error. Affirmed.

REAL ESTATE TRUST & INS. CO., Inc., et al. *v.* GWYN.

March 14, 1912.

[74 S. E. 208.]

1. Carriers (§ 340*)—Elevators—Negligence—Last Clear Chance.—Where one attempting to leave a descending elevator which failed to stop was struck on the head by the top of the car and almost instantly thereafter caught between it and the floor sill and killed, the doctrine of the last clear chance had no application.

[Ed. Note—For other cases, see Carriers, Cent. Dig. § 1354; Dec. Dig. § 340.* 10 Va.-W. Va. Enc. Dig. 380, 389.]

2. Carriers (§ 321*)—Elevators—Action for Causing Death—Instruction—Words and Phrases—"Error in Extremis."—In an action to recover for the death of one killed by being caught between the top of a descending elevator and a floor sill, where there was evidence that the decedent put one foot through the partly opened elevator door and upon the floor sill without the elevator being stopped, there was no warrant for an instruction upon the doctrine of "error in extremis" which presupposes that the party who invokes it is himself free from fault in creating the emergency.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1247, 1326-1337, 1343; Dec. Dig. § 321.* 10 Va.-W. Va. Enc. Dig. 413.]

Error to Law and Chancery Court of City of Norfolk.

Action by Helen C. Gwyn, administratrix, against the Real Estate Trust & Insurance Company, Incorporated, and others. From a judgment for plaintiff, defendants bring error. Reversed and remanded for new trial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.